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No. 96-1794

In The

Supreme Court of the United States

October Term, 1996

SOON DUCK KIM, *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The State Of New York

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation respectfully submits this *amicus curiae* brief on behalf of itself in support of Petitioners, Soon Duck Kim, *et al.* Pursuant to Supreme Court Rule 37.2, this *amicus curiae* brief is filed with written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, membership, public interest, legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, limited government, and the free enterprise system. MSLF's members include businesses and individuals throughout the country who own and use land, including members in the State of New York.

MSLF's interest in the outcome of this lawsuit is directly tied to its members' private property rights. MSLF believes that the ruling of the New York Court of Appeals does violence to the precedent decisions of this Court that recognize the constitutional vitality of private property rights.

[1] Copies of the consent letters were concurrently filed with the Clerk of Court.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

MSLF hereby adopts Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case.

SUMMARY OF ARGUMENT

Contrary to this Court's precedent, New York's highest court has held that an owner has no remedy for a regulatory taking so long as the taking was authorized by a statute enacted before the owner acquired title to the property. Property rights are not nullified, however, by the pre-existence of a restrictive regulation. Only the courts and state private nuisance laws can encumber a person's property rights.

If the New York Court of Appeal's ruling stands, property owners will face insurmountable ripeness obstacles in challenging government takings.

A windfall would not result if the Petitioners succeed in their takings claim. There is no evidence that the purchase price paid by Petitioners was discounted because of an awareness of the obligations of the New York City Charter. Further, a reversal of the decision of the New York Court of Appeals would put sellers and purchasers on notice that a subsequent landowner may rightfully make a takings claim even if the purchaser buys the land subsequent to a potentially restrictive regulation.

ARGUMENT

I. The Placement Of Almost 2,400 Square Feet Of Side Fill On Petitioners' Land Is A Physical Invasion.

This Court has established, as a basic tenet of land-use jurisprudence, that certain rights are fundamental to the concept of private property. Among those fundamental rights are the right to absolute and exclusive ownership and possession of property and the right to evidence such exclusive ownership and possession by excluding others from one's property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). To the extent that government agencies or persons acting under color of law deprive a property owner of the right to exclude others, this Court has declared such acts to be a deprivation of those fundamental rights and a taking of a property interest under the Fifth and Fourteenth Amendments to the United States Constitution, irrespective of the extent of the occupation or the identity of the interloper. *Id.*; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also, Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871) (taking found where water overflow from dam permanently flooded landowners' property).

Contrary to the clear and unambiguous decisions of this Court, New York's highest court has determined that, simply because Petitioners purchased their property after the enactment of the New York City Charter, Petitioners, as a matter of law, waived their constitutionally-protected property rights. Moreover, in its decision, the New York Court of Appeals established, as a rule of law, that an owner has no remedy for a regulatory taking – or even for a permanent physical occupation of his land by the

government – so long as the taking was authorized by a statute enacted before the aggrieved owner acquired title to the property. The decision of the New York Court of Appeals does such injustice to settled law, as expressed in the precedent decisions of this Court and other courts, that it must be reversed.

A. Respondent's Deprivation Of Petitioners' Right To Exclude Others From Petitioners' Property Is A Taking Of Petitioners' Fundamental Property Rights.

The decision of the New York Court of Appeals is in direct conflict with the recent decisions of this Court. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871).

In *Pumpelly*, this Court held that flooding of private property constituted a taking. In so holding, the Court stated:

> [W]here real estate is actually invaded by super-induced additions of water, *earth, sand,* or other material . . . it is a taking, within the meaning of the Constitution.

Pumpelly v. Green Bay Co., 80 U.S. at 181 (Emphasis added). In *Kaiser*, this Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. at 179-80. In *Loretto*, this Court emphasized that "when the 'character

of the governmental action' is a permanent physical occupation of property, our cases have found uniformly a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 434-35.

Also, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987), this Court held: "We think a 'permanent physical occupation' has occurred, . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed. . . . " *Nollan*, 483 U.S. at 831-32.

This Court, in *Nollan*, reaffirmed its rationale in *Loretto* by holding "our cases universally have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 831 (quoting *Loretto*, 458 U.S. at 434-35). One need only compare the limited extent of the "physical invasions" held to be a sufficiently intrusive infringement upon the fundamental rights of the property owners in *Loretto* and *Nollan* with the forced occupation of almost 2,400 square feet of Petitioners' property by gravel dumped by the City of New York to conclude that a significantly greater invasion of Petitioners' property has occurred than the Court found to be constitutionally offensive in *Loretto* and *Nollan*.

In this case, the New York Court of Appeals has decided an important federal question of fundamental

property rights in clear conflict with the applicable decisions of this Court. MSLF strongly believes that, both to protect the rights of Petitioners and to secure the fundamental rights of all property owners from unwarranted incursions by government regulatory agencies, this Court must settle the questions raised by Petitioners. The New York Court's holding that permanent physical occupations of private property do not require just compensation directly conflicts with this Court's holding, set out in *Loretto* and *Nollan*, that a permanent physical occupation is a *per se* taking.

B. The Existence Of A Statute Authorizing A Taking Does Not, In And Of Itself, Require Petitioners To Surrender To Respondent Their Constitutionally-Protected Right To Exclude Others From Her Property Simply Because That Property Was Purchased After Enactment Of The Statute.

According to the legal theory advanced by the New York Court of Appeals, property owners must be prepared to surrender their property rights under the Takings Clause so long as the taking was authorized by a statute enacted before the aggrieved owner acquired title to the property. As the New York Court of Appeals held, "the lateral-support obligation imposed on plaintiffs was a prevailing rule of the State's property law when they acquired their property and, accordingly, encumbered plaintiffs' title and the constituent bundle of rights." Petitioners' App. A-14.

Contrary to the holding of the New York Court of Appeals, neither the New York City Charter nor the common law is a pre-existing limitation on Petitioners' title that would deprive Petitioners of their rights under the Takings Clause. The placing of the side fill on Petitioners' property constituted a taking of private property for public use that requires compensation.

Recently, this Court has held that property rights are not nullified or even encumbered by the pre-existence of a restrictive regulation. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

In *Nollan*, a long-standing land use regulation prevented the owners of beachfront property from rebuilding their house unless they first gave the public an easement across a sandy strip of the property adjacent to the ocean. *Id.* The owners challenged the California Coastal Commission's implementation of this regulation, claiming that it amounted to a taking without just compensation. *Id.* This Court held that the Commission's refusal to issue the building permit except upon transfer of the easement amounted to a taking, for which compensation must be paid. In response to Justice Brennan's dissent, the majority held that the Nollans' rights were not "altered because they acquired the land well after the Commission had begun to implement its policy." *Id.* at 833 n.2.

In making its ruling, the New York Court of Appeals has taken the position that no taking has occurred because Petitioners never had unrestricted title to their property. The Court argued that the New York City Charter somehow deprived Petitioners of their entire bundle

of rights guaranteed to them by the Fifth Amendment to the United States Constitution; however, this argument is contrary to earlier rulings by this Court.

In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), this Court ruled that a property owner's title contains the restrictions on use that could only, "have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally."

II. The New York Court Of Appeals' Decision Raises Potentially Insurmountable Ripeness Obstacles To Property Owners Who Might Be Faced With Regulatory Takings Of Their Land.

A case is not yet ripe (and therefore not yet justiciable) if it has not yet become sufficiently concrete to be worthy of adjudication. *See United Public Workers v. Mitchell*, 330 U.S. 75 (1947). The courts require an actual, present controversy, and therefore will not act when the issue is only hypothetical or the existence of a controversy merely speculative. *See* BLACKS'S LAW DICTIONARY, at 1328.

When the New York City Charter was enacted in 1978, the case was not yet ripe for a takings challenge. A taking had not occurred on Petitioners' land when the City created the charter that raised the grade of their street. (*see, Nollan v. California Coastal Commn.*, 483 U.S. 825, 833(1987). A government taking was "merely speculative" at that time. *See* BLACKS'S LAW DICTIONARY, at 1328. The charter did, however, limit Petitioners' construction of improvements to the grade specified in the

charter. Until the City actually raised the grade of the street and side-filled almost 2,400 square feet of Petitioners' property, some ten years after the enactment of the charter, however, it was impossible to determine the extent of the taking of that property. *See Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir.1988) (taking is complete when it occurs and suit for just compensation is not ripe until it is apparent that state does not intend to pay compensation); *Gasser v. U.S.*, 14 Cl.Ct. 476 (1988) (the date of actual physical possession constitutes the date of taking).

If the ruling of the New York Court stands, "as applied" takings claims in all cases where property has been sold subsequent to the adoption of land regulations will be nullified. The previous landowner will have no claim under the Takings Clause because of ripeness limitations, and the current owner will have no claim under the Takings Clause because of the rule set forth by the New York Court of Appeals.

The conflict between the decision of the New York Court of Appeals and the clear statements of constitutional law expressed by the decisions of this Court and other federal courts, underscores the need for this Court to restate and to clarify the protection that it has previously afforded property owners. If the decision of the New York Court of Appeals is allowed to stand, property rights can be involuntarily transferred to the State without any recourse for the landowners, as guaranteed by the Fifth Amendment to the United States Constitution.

III. A Windfall Would Not Result if Petitioners Succeed On Their Takings Claim.

In making its ruling, the New York Court of Appeals argued that Petitioners would receive a windfall if they succeeded on their takings claim. The court determined that Petitioners might have discovered an encumbrance on the property caused by the existence of the New York City Charter, a discovery that would lead to a discount in the purchase price of the property. The court argued,

> [c]onsequently, if plaintiffs were to succeed on their takings claim, they could receive the windfall of initially receiving a reduction in the purchase price on account of this obligation and subsequently receiving compensation when the obligation is enforced. Such a result is inconsistent with the basic purpose of takings law . . . not to enrich the landowner at the public's expense.

Petitioners' App. A-14.

This argument is flawed. There is no evidence in the record or elsewhere that indicates the purchase price paid by Petitioners was discounted because of an awareness of the obligations set forth in the New York City Charter. Indeed, Petitioners filed a lawsuit against the previous owners of the property claiming fraudulent inducement. This lawsuit was based on the predicate that the previous owners did not disclose those obligations and rights heretofore announced by the New York Court of Appeals' majority.

Further, a reversal of New York's interpretation of the Takings Clause would not create a windfall for future

purchasers of land. On the contrary, a reversal would create clear precedent defining the rights of property owners who purchase property subject to an existing regulation. Sellers and purchasers alike will be put on notice that a subsequent landowner may rightfully make a takings challenge in such a case. Consequently, a takings claim, guaranteed under the United States Constitution, will not "enrich the landowner at the public's expense."

Instead of basing a Constitutional question on a mere possibility that a windfall may occur, courts will be certain the landowner will not be unjustly enriched.

CONCLUSION

MSLF respectfully urges this Court to find that the City of New York violated the Fifth Amendment to the United States Constitution when it exacted Petitioners' private property for public use. Since the decision of the New York Court of Appeals is in clear and irreconcilable conflict with numerous holdings of this Court, the petition should be granted.

Respectfully submitted,

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